IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20-6-2005

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

S.A. No.1410 of 1993

Pathamuthu Joharan .. Appellant

vs.

1. Syed Ibrahim (died)
2. Habuta Nachiar
3. Mahaboola Nisa
4. Kamarunnisa
5. Bokaruddin
6. Akber Ali .. Respondents

RR2 to 6 have been brought on record as LRs of deceased First respondent as per order of Court dt. 8/9/97 by SJJ (vide CMP 10275/94)

Second Appeal against the judgment and decree dated 10.2.1993 made in A.S.No.213 of 1991 on the file of the District Judge, Nagapattinam confirming the judgment and decree dated 9.5.1991 in O.S.No.56 of 1988 on the file of the Subordinate Judge, Nagapattinam.

For Appellant : Mrs.G. Devi

For Respondents : Mr.K.Chandramouli, S.C.
For Mr.A.Muthukumar for RR2 to 6

...

JUDGMENT

The defendant before the court below is the appellant.

2. The respondent filed the suit for recovery of possession of the suit property from the appellant and for future mesne profits. The appellant resisted the suit by filing written statement. The trial court having analysed the evidence both oral and documentary adduced on either side and upon hearing the arguments of both sides decreed the suit as prayed for and directed a separate enquiry regarding future mesne profits under Order 20 Rule 12 C.P.C.

3. Aggrieved by the judgment and decree passed by the trial court, the appellant preferred the appeal before the District Judge,

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Nagapattinam in A.S.No.213 of 1991. The learned District Judge after considering the recorded evidence and the arguments of both sides confirmed the judgment and decree passed by the trial court and dismissed the appeal. Hence, the above Second Appeal.

4. The averments in the plaint filed by the respondent/plaintiff may be briefly stated as follows:-

(a) The common ancestor of the plaintiff and the defendant is Sikkandar Rowthar. The plaintiff is the grand son of the Sikkandar Rowthar. The defendant is the grand daughter of the said Sikkandar Rowthar through his another son Mohamed Hussain. Sikkandar Rowther executed a settlement deed dated 8.6.1935 in respect of all his properties in favour of his sons and he retained the right of enjoyment over the properties settled thereunder during his life time. 'A' schedule property in the settlement deed had been given to Mohamed Sultan to be taken and enjoyed by him absolutely and 'B' schedule property had been given to Mohamed Hussain absolutely. 'C' and 'D' schedule properties in the settlement deed had been given to his 3rd son Mohamed Kasim and his wife Fathima Bibi.

(b) The suit property is a portion of the house given to Mohamed Sultan under the said settlement deed and the remaining portion of the house was given to Mohammed Hussain. After the death of Sikkandar Rowthar his sons, namely, Mohamed Sultan and Mohamed Hussain became entitled to their respective portions in the house as per the settlement deed. The property tax was paid by both of them in respect of the house property.

(c) After the death of Mohamed Sultan, all his properties including the suit property had devolved upon his 2 wives and 3 sons and a daughter by his second wife in accordance with the Muslim law. After the death of one of the widows, Raguman Bibi, her share also devolved upon her 3 sons and a daughter. The plaintiff obtained the release deed dated 23.3.1983 from his two brothers, Mohamed Arif and Mohamed Ismail and sister Noorjahan. Under sale deed dated 31.1.1984 having purchased the undivided share of his step mother Jamina Bibi also, the plaintiff has become the absolute owner of the suit property.

(d) The defendant obtained release deed from her mother Ajitha Bibi and sisters Urunnisa and Noorjahan by means of a registered deed dated 29.12.1983. The defendant who is the grand daughter of Sikkandar Rowthar has no manner of right or title to any portion in the suit property. Her claim that her father Mohamed Hussain has prescribed title by adverse possession has no legal basis and therefore the plaintiff is entitled to recover possession of the suit property and to receive future mesne profits.

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5. The averments in the written statement filed by the appellant/defendant are briefly as follows:-

The plaintiff is not the son of Mohamed Sultan who had married only one wife and therefore it is false to contend that Mohamed Sultan married the mother of the plaintiff also. Sikkandar Rowthar had 3 sons Mohamed Sulthan, Mohamed Hussain and Mohamed Kasim. The plaintiff has suppressed the existence of the son Mohamed Kasim. Similarly, Syed Ebrahim and Mohamed Arif and Mohamed Ismail and Noorjahan are not sons and daughter of Mohamed Sultan. Therefore the plaintiff is not the grand son of Sikkandar Rowthar as alleged. On the date of the settlement deed executed by Sikkandar Rowthar (i.e.,) 8.6.1935, Mohamed Sultan was living in Rangoon and therefore he did not accept the settlement and obtained possession of the properties thereunder. Mohamed Sultan had never enjoyed any of the properties covered by the settlement deed. In fact, the defendant, daughter of Mohamed Hussain has been in possession and enjoyment of the suit property. Further she has also perfected title to the suit property by adverse possession. The suit is not valued properly for the purpose of court-fee.

6. On the above pleadings, the following issues were framed by the trial court for trial:-

(1) Whether the plaintiff is entitled to the relief of recovery of possession of the suit property?
(2) To what relief, the plaintiff is entitled to?

7. In the appeal, the learned District Judge had also framed the following issues for consideration:-

(1) Whether Mohamed Sultan had married two wives as claimed in the plaint?
(2) If so, whether the plaintiff is the son of Mohamed Sultan through his second wife?
(3) Whether the defendant has perfected title to the suit property by adverse possession?

8. Having perused the recorded evidence and upon hearing both sides, the courts below have rendered concurrent judgments holding that the respondent is entitled to the suit property, that he is the son of Mohamed Sultan born through his second wife, that the appellant has not perfected title to the suit property by adverse possession and that therefore the respondent is entitled to the reliefs as prayed for.

9. Heard Mrs.G.Devi, learned counsel for the appellant and Mr.K.Chandramouli, learned senior counsel for the respondents.

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10. The learned counsel for the appellant/defendant has argued that the courts below failed to consider the document under Ex.A-2 whereby the house was divided into two portions, one settled in favour of Mohamed Sultan and another in favour of Mohamed Kasim and Mohamed Sultan had not accepted the settlement and taken possession of the property. Therefore the settlement in favour of Mohamed Sultan was not acted upon and hence became invalid under law. The courts below failed to see that Mohamed Sultan had only one wife Jamina Bibi and he did not marry Raguman Bibi as his second wife. Therefore, the courts below ought to have held that the marriage of the second wife to Mohamed Sultan has not been proved in accordance with law. Similarly, courts below failed to appreciate the evidence to prove the defendant's title to the suit property by adverse possession.

11. In the above circumstances, the following substantial questions of law were formulated by this court on 3.11.1993 for consideration:-

> (1) Whether the courts below have correctly and properly interpreted Exs.A-3, A-4 and A-5?
>
> (2) Whether the courts below are justified in rejecting the plea of adverse possession by the defendant and her predecessors-in-title?
>
> (3) Whether the courts below are justified in finding that the settlement deed Ex.A-2 executed by the grand father of the defendant is valid?

12. The parties to this appeal may be referred to hereunder as they were arrayed before the trial court. Since rendering a finding with reference to one question is likely to overlap the other one, all the substantial questions are discussed together.

13. The facts which are not in controversy may be set out as under so as to analyse the recorded evidence and the arguments advanced on either side in this appeal. The suit property is a building which originally belonged to Sikkandar Rowthar. He executed the registered Hiba deed dated 8.6.1935 Ex.A-2 in favour of his wife Fathima Bibi and 3 sons, Mohamed Sultan, Mohamed Hussain and Mohamed Kasim and the portion described in 'A' schedule in Ex.A-2 was given to Mohamed Sultan, the portion 'B' schedule to Mohamed Hussain, the portion 'C' schedule to Mohamed Kasim and the portion in 'D' schedule to Fathima Bibi. After the death of Sikkandar Rowthar and Fathima Bibi, their heirs became entitled to the said properties. Mohamed Sultan married Jamina Bibi and they had no issues. Mohamed Hussain married Ajitha Bibi and they had begotten 3 daughters, namely Pathamuthu Joharan, Urunnisa and Noorjahan. The appellant/defendant is the said Pathamuthu Joharan.

14. The learned counsel for the appellant has argued at the

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outset that the Hiba deed under Ex.A-2 executed by Sikkandar Rowthar was not accepted by Mohamed Sultan, who was residing in Rangoon at that time and that since Mohamed Hussain, father of the defendant alone was in India residing in the suit property, the plaintiff claiming under Mohamed Sultan could not have had any title to the suit property. Similarly, she would contend that Mohamed Sultan never got into the possession of the suit property either under the settlement deed Ex.A-2 or by any other process known to law.

15. In answer to such contention, Mr.Chandramouli, learned senior counsel appearing for the respondents 2 to 7, legal heirs of the deceased first respondent/sole plaintiff would draw the attention of this court to Exs.B-16 to B-44 documents to show that the gift under Ex.A-2 was not only accepted by Mohamed Sultan, but he was also in possession and enjoyment of his portion in the suit property pursuant to the gift deed under Ex.A-2. A careful scrutiny of Ex.B-16 to B-44 would indicate clearly that the house tax was paid by Mohamed Sultan for himself and on behalf of other donees under Ex.A-2. Therefore this Court is of the considered view that since the house tax was assessed in the name of Mohamed Sulthan (vide) Ex.B-16 to B-44 from 1963 to 1983, it is too late in a day to contend that Mohamed Sultan had not accepted the gift in his favour as per Ex.A-2. In this context, both the courts below have analysed the evidence on this aspect of the matter and came to the right conclusion that all the 3 sons of the deceased Sikkandar Rowthar accepted the gift and acted upon the settlement deed under Ex.A-2 and that they were in possession and enjoyment of the respective shares in the suit property as per the gift deed. Hence, this court is unable to accept the first contention put forth by the learned counsel for the appellant.

16. The next contention urged in the argument of the learned counsel for the appellant is that the plaintiff (since deceased) was not born to Mohamed Sultan through his second wife as alleged and that therefore he would not have succeeded to any portion in the suit property as a heir of the deceased Mohamed Sultan. According to the plaintiff, Mohamed Sultan married Jamina Bibi as his first wife and since they had no issues, he married Raguman Bibi as his second wife and out of their wedlock, the plaintiff, 3 other children namely Mohamed Arif, Mohamed Ismail and Noorjahan were born to them. In support of such contention Exs.A-2 to A-4, A-5, A-8, A-15 and A-16 have been pressed into service in the evidence of P.W.1, the plaintiff.

17. Ex.A-4 is the registered sale deed dated 31.1.1984 executed by Jamila Bibi, first wife of Mohamed Sultan in favour of the plaintiff in respect of her undivided 1/16th share in the suit property and other properties and the relevant recitals relied on by the learned counsel for the plaintiff in the said document are as follows:-

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"இதனடியில் கண்ட விபரப்படிய,ள்ள சொத்து காலம் சென்ற எனது கணவரும் எனது தந்தைய,மான A.S.முகம்மது சுல்த்தான் அவர்களுக்கு அவரது தந்தையார் சிக்கந்தர் ராவ,த்தரால் சென்ற 8.6.1935 தேதியில் எழுதிவைக்கப்பட்டுள்ள செட்டில்மெண்டுப்படிய,ம் ரூ,ளூ,முகம்மது சுல்த்தான் அவர்களால் சென்ற 20,8,1956 தேதி அப்துல் உறமீது ராவ,ததரிடமிருந்து வாங்கிய கிரய சாசனப்படிய,ம் கிடைத்து என்னுடனும் அவர் இரண்டாம் தார மனைவி ரஉறிமான் பிவிய,டனும் சர்வசுதந்திர பாத்தியங்களுடன் ஆண்டு அனுபவித்துவந்து ஷ A.S.முகம்மது சுல்த்தான் 24.1.78 தேதியில் காலமாகிவிட்டார்,"

18. The above recitals in the sale deed executed by the first wife of Mohamed Sultan have proved categorically that Mohamed Sultan married two wives, namely, Jamina Bibi and Raguman Bibi and that the plaintiff is the son of Mohamed Sultan born through his second wife. Similarly, Ex.A-16 marriage invitation dated 14.2.1956 discloses that Mohamed Sultan being the father of the plaintiff celebrated the plaintiff's marriage and therefore it is evident that the acknowledgement of both Mohamed Sultan and his wife Jamina Bibi that the plaintiff is the son of the former through his second wife would vouch-safe the paternity of the plaintiff now under question.

19. In this context, learned senior counsel appearing for respondents 2 to 6 has drawn the attention of this court to the provisions of law under Sections 226 and 227 of the Muslim Law by THABJI (4th Edition at page 208) with reference to proof of paternity and presumption of acknowledgement of parentage respectively in support of his further argument that the documents ante litum mortem referred to above would establish the paternity of the plaintiff as well as the presumption of acknowledgement arising therefrom.

20. The above principles of law under Sections 226 and 227 read as follows:-

> "226. Proof of paternity: Statements by a member of the family touching the sonship or heirship of a person are good evidence of the family report concerning him.
>
> 227. Adoption not known to Muslim law: If a man has openly treated another as his child, it may be presumed that the former has acknowledged the parentage of the latter."

21. In view of the above provisions of law in the light of the documentary evidence under Exs.A-4, A-15 and A-16, the paternity of the plaintiff that he was born to Mohamed Sultan through his second wife Raguman Bibi has been amply established. Similarly, the acknowledgement of both Mohamed Sultan and his first wife Jamina Bibi as per Exs.A-4, A-15 and A-16 also lend support to the proof of

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paternity. As has been rightly argued by the learned senior counsel for the respondents, in view of the ratio laid down in the decision HOHAMMAD SADIQ v. MOHAMMAD HASSAN (AIR (30) 1943 LAHORE 225), the acknowledgement of Mohamed Sultan that the plaintiff is his son born through the second wife has to be held as proved until the contrary is established by the defendant adducing rebuttal evidence and the ratio laid down therein reads as follows:

> "The same subject has been dealt with in para 85 of Wilson's Ango Mahomedan Law where it is laid down that if a man has acknowledged another as his legitimate child, the presumption of paternity arising therefrom can only be rebutted by (a) disclaimer on the part of the person acknowledged; (b) such proximity of age, or seniority of the acknowledgee, as would render the alleged relationship physically impossible; (c) proof that the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten. None of these four impediments has either been alleged or established in the present case."

22. In this case also, as per the ratio referred supra, the defendant has not alleged or established any of the impediments narrated by the said decision. Therefore this Court is of the considered view that the contention put forth on the side of the appellant in this respect has to be rejected as not sustainable. It follows necessarily that the finding of fact rendered by both the courts below on this aspect of the matter has to be affirmed.

23. The last contention of the learned counsel for the appellant is that by adverse possession, the defendant has perfected her title to the suit property. In this regard, as has been rightly argued by the learned senior counsel for the plaintiff, on her own showing as per Exs.B-16 to B-44, receipts for payment of house tax issued in favour of Mohamed Sultan and others from 1963 to 1983, such contention of the defendant cannot stand even a moment's scrutiny for the simple reason that Mohamed Sultan was in possession of the property within 12 years prior to suit and that the suit was laid within 5 years from the date of last receipt under Ex.B-44 issued on 30.8.1983 in favour of him.

24. Hence, the learned senior counsel for the plaintiff placed reliance on the decision rendered by this Court NAGARAJAN v. RAJAMANI IYER (1999 (I) C.T.C. 428) wherein the statement of law on this subject has been reiterated as under. The learned Single Judge having considered catena of decisions rendered by this Court, other High Courts and the Apex Court and quoted the principle of adverse possession as laid down by the Apex Court in DR.MAHESH CHAND SHARMA v. RAJKUMARI SHARMA (AIR 1996 S.C. 569) which reads as follows:-

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"A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession."

25. If the evidence let in by the defendant is analysed in the light of the above principle of law cited above, there is no doubt that she has neither pleaded specifically in her written statement all the necessary averments to constitute the plea of adverse possession nor let in any evidence worth mentioning to establish such plea.

26. But, on the contrary, the documentary evidence Exs.B-16 to B-44 as referred to above are not only against the defendant on this aspect but would also establish that the plaintiff's predecessor-in-title was in effective possession and enjoyment of his share in the suit property for more than 13 years till his death. Similarly, the other evidence let in by the plaintiff has categorically established his possession and enjoyment of the suit property along with other heirs till he acquired absolute right and title to the same by virtue of registered documents under Exs.A-3 and A-4, registered release deed dated 23.3.1983 and sale deed dated 31.1.1984 respectively executed by the other heirs of Sikkandar Rowthar in respect of their undivided share in the suit property.

27. For the aforesaid reasons, this Court finds no illegality in the judgments and decrees rendered by both the courts below and therefore the Second Appeal deserves no merit and is accordingly dismissed. However, there shall be no order as to costs.

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Sd/
Asst.Registrar

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TO

Sub Asst.Registrar

1. The District Judge, Nagapattinam.
2. The Subordinate Judge, Nagapattinam.
3. The Section Officer, V.R.Section, High Court, Madras.

+ 1 CC TO MR. RAGHUPATHI & G. DEVI, ADVOCATE (CC SR NO. 25147)

+ 1 CC TO MR.A. MUTHUKUMAR, ADVOCATE (SR NO 24883)

Judgment
in
S.A. No.1410 of 1993

JP (CO)
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